Supreme Court, U. S.
FILED
JAN 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1005

ROBERT E. BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

/

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NOW COMES, Carl P. Ranno, attorney for Petitioner, ROBERT E.BROWN, and prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on December 14, 1977.

CITATIONS TO OPINION BELOW

The Order and decision of the United States Court of Appeals for the Sixth Circuit was filed on December 14, 1977, and it lineated as Nos. 76-1877 and 76-1905. That Order and decision affirmed the conviction of the Petitioner upon jury verdict finding Defendant-Appellant guilty of conspiring to and of using extortionate means to collect money in violation of 18 U.S.C. § 894.

A copy of the opinion is included in the Appendix to this Petition.

JURISDICTION

The order and opinion of the United States Court of Appeals for the Sixth Circuit was filed on December 14, 1977. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I. WHETHER ERROR WAS MADE BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN THAT SAID COURT RELIED UPON A CERTIFICATION BY THE DISTRICT COURT JUDGE WHO HAD CONCLUDED THAT NO ERROR PREJUDICIAL TO THE APPELLANT RESULTED FROM THE FINAL ARGUMENT OF THE PROSECTOR TO THE JURY, THAT PORTION OF THE TRANSCRIPT HAVING BEEN DESTROYED AND NOT PART OF THE RECORD BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND FURTHERMORE WHETHER SAID CERTIFICATION DENIED THE APPELLANT'S RIGHTS GUARANTEED UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

II. WHEN A DEFENDANT IS DEPRIVED OF A FULL AND COMPLETE TRANSCRIPT OF CRIMINAL PROCEEDINGS DUE TO THE COURT REPORTER INADVERTENTLY DESTROYING A PORTION OF THE RECORD WHEN SAID DESTROYED PORTION CONTAINS FURTHER DIRECT TESTIMONY FROM THE DEFENDANT AS WELL AS CROSS EXAMINATION AND OTHER EXAMINATION OF THE DEFENDANT AS WELL AS THE CO-DEFENDANT AND CO-CONSPIRATOR'S CASE WHICH INDICATED THE STATE OF MIND OF THE COMPLAINANT AND CHIEF WITNESS FOR THE GOVERNMENT AS WELL AS THE PREJUDICIAL REMARKS MADE BY THE ASSISTANT U.S. ATTORNEY IN HIS CLOSING ARGUMENT, HARM THE DEFENDANT'S SUBSTANTIAL RIGHTS AND SHOWED THAT SAID CASE BE REVERSED,

OR IN THE ALTERNATIVE A NEW TRIAL GRANTED.

Petitioner answers in the affirmative.

The U.S. District Court indicated that the answer would be in the negative.

The United States Court of Appeals for the Sixth Circuit did not have the available transcript to respond to said question, but adopted the opinion of the lower court.

III. WHETHER THE EVIDENCE SUBMITTED BY THE GOVERNMENT WAS INSUFFICIENT TO SUSTAIN A CONVICTION OF THE OFFENSE AS CHARGED IN THE INDICTMENT AGAINST MR. BROWN.

Petitioner answers in the affirmative.

The U.S. District Court answered in the negative.

The United States Court of Appeals for the Sixth Circuit indicated only that there was sufficient evidence to establish the crime.

IV. WHETHER THE EVIDENCE INTRODUCED AT TRIAL REGARDING EXTORTION MET THE LEGISLATIVE INTENT WHICH IS THE BASIS FOR THE ENACTMENT OF 18 U.S.C. § 894.

Petitioner answers in the negative.

The U.S. District Court answered in the affirmative.

The United State Court of Appeals for the Sixth Circuit did not respond.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which this Petition involves is:

CONSTITUTION OF THE UNITED STATES,

AMENDMENT V:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty or property without due process of law . . ."

AMENDMENT VI:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . and to have the Assistance of Counsel for his defense."

STATEMENT OF FACTS

In December of 1972, the Appellant, ROBERT E. BROWN, a supervisory employee of the Michigan Bell Telephone Company, loaned $3,000 to a man named Cecil Ernest Tucker. The loan was made for the benefit of Mr. Tucker's company known as W. J. Dolan Company. The Dolan Company was involved in construction for the Michigan Bell Telephone Company. One of Mr. Brown's functions as an employee of the telephone company was involved with underground construction. Originally, Mr. Brown felt that the loan was actually to purchase a part of said company, but shortly after making said loan, realized that this was not the case. The sum of $3,000 was to be repaid to Mr. Brown within one year.

However, after the expiration of the time period, it had not been paid and has not been repaid nor is it to this date. Shortly before December 20, 1974, the Appellant approached an old friend, one Lawrence Malcolm Welsh, and requested Mr. Welsh to assist him in recovering the loan. The approach to Welsh was made by Mr. Brown when he learned that Mr. Tucker was involved in a type of embezzlement from the phone company. Mr. Brown was very fearful that Mr. Tucker would attempt to use those same means to force Mr. Brown to embezzel from his employer. Furthermore, Mr. Brown was of the opinion that if the loan ever became apparent to his company, there may be a claim of conflict of interest which, in fact, was not the

case and that there was never any conflict between Mr. Brown and his employer.

Subsequent to the conversation with Mr. Welsh, Mr. Tucker allegedly received a phone call threatening him regarding the return of the money to Mr. Brown. Immediately thereafter Mr. Tucker made a phone call back to Mr. Welsh from a local police department which was recorded. That recorded conversation indicates a threat by Mr. Welsh if the money was not returned. When Mr. Brown was advised of this conversation by Mr. Tucker, he immediately told Mr. Welsh to have no further contact with Mr. Tucker.

The Federal Bureau of Investigation contacted Mr. Brown, investigating the allegations of

extortion brought by Mr. Tucker. Mr. Brown cooperated fully with the authorities and in fact testified before the Grand Jury feeling that he had done nothing wrong. Mr. Tucker, after having received immunity from the Government, also testified before the Grand Jury and subsequent thereto an indictment was brought against your Petitioner as well as Lawrence Malcolm Welsh, a/k/a Johnny Welsh. The indictment is in three parts, two counts against Mr. Brown being Count II, aiding and abetting to collect an extension of credit by extortionate means contrary to Section 2 and 894, Title 18, United States Code. Count III is a charge of conspiracy to attempt to collect an extension of credit by extortionate means in violation of 18 U.S.C.

§ 894. At the close of Government's proofs, your Petitioner moved for a directed judgment of acquittal based on the fact that the Government had not presented a case as to the Defendant Brown. Said motion was based primarily upon the legislative intent as well as the lack of evidence presented by the Government. Said motion was denied. At that point Defendant Brown took the stand in his own defense and testified that he had in fact loaned the money to Mr. Tucker, and that in December of 1974, he had heard rumors that there were some kickbacks involved regarding Mr. Tucker. Mr. Brown further testified that Mr. Tucker advised him that if he wanted his money returned, he would have to embezzle money from the Company. At that

point, Mr. Brown "became scared". The testimony further indicates that because of this situation and the uncomfortable position he was placed in with his company, Mr. Brown contacted Mr. Welsh. He requested Mr. Welsh to help him return his money, but there is no indication whatsoever that Mr. Brown ever requested that Mr. Welsh threaten Mr. Tucker.

On December 20, 1974, Mr. Brown again met with Mr. Tucker and was advised that Mr. Tucker had been threatened by Mr. Welsh. At that point, Mr. Brown immediately contacted Mr. Welsh and advised him not to contact Mr. Tucker again.

On page 262 of the transcript on direct examination, Mr. Brown was asked as to a second conversation he

had with Mr. Tucker in March of 1975. Mr. Brown was asked what was the content of the conversation, if he could recall. At that point, Mr. Hunterton, the Assistant United States Attorney, objected. The transcript then concludes with argument between Mr. Brown's counsel and the U.S. Attorney regarding the propriety over an objection. It is interesting to note that at that point the transcript becomes disjointed in that Mr. Hirschhorn, attorney for Mr. Welsh, is suddenly on the scene indicating a subpoena for an officer. The transcript then ends with the jury returning a verdict of guilty.

Unknown to your Petitioner, Mr Brown, the rest of the transcript was

inadvertently erased by the court reporter. This included further direct examination of Mr. Brown, cross examination by Mr. Hunterton, the Assistant U.S. Attorney, and examination by Mr. Hirschhorn, the Co-Defendant's attorney as well as redirect examination by Mr. Brown's attorney. After all of this testimony was placed on the record, the Defendant Brown rested and Mr. Hirschhorn presented testimony from a police officer at the Livonia Police Department. Subsequent thereto there were further arguments made regarding acquittals and then closing argument, it was Defendant Brown's contention in a subsequent motion for judgment of acquittal, or in the alternative for a new trial, that the Assistant U.S. Attorney had mis-

stated the facts and injected his own opinion which resulted in confusion to the jury.

An Affidavit was received from James Lee Briggs, the court reporter, indicating that direct testimony from Defendant Brown, including approximately five minutes of his direct testimony was unavailable. This Affidavit was received along with a memorandum of law from the trial judge indicating that this was not basis for a new trial. At that juncture, Mr. Brown had no attorney and made a request for a court appointed attorney because of his indigent position. The Affidavit from the court reporter is not accurate in that much more testimony and argument, as well as closing argument were destroyed. Prior to knowledge that the transcript had

been destroyed, a motion for judgment of acquittal or in the alternative for a new trial, had been made by Defendant Brown which was denied by the trial judge. Said motion, argument and brief, as well as the order of the trial judge, are a part of this record which has not been destroyed.

An appeal was perfected to the United States Court of Appeals for the Sixth Circuit, arguments were had in open court, and the matter was remanded because of the deficiency of the transcript of the trial court record. The District Judge made a certificate to the United States Court of Appeals in which the defense attorneys did not agree. The United States Court of Appeals then affirmed the lower court's conviction.

REASONS FOR GRANTING WRIT

I. WHETHER ERROR WAS MADE BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IN THAT SAID COURT RELIED UPON A CERTIFICATE BY THE DISTRICT COURT JUDGE WHO HAD CONCLUDED THAT NO ERROR PREJUDICIAL TO THE APPELLANT RESULTED FROM THE FINAL ARGUMENT OF THE PROSECUTOR TO THE JURY, THAT PORTION OF THE TRANSCRIPT HAVING BEEN DESTROYED AND NOT PART OF THE RECORD BEFORE THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND FURTHERMORE WHETHER SAID CERTIFICATION DENIED THE APPELLANT'S RIGHTS GUARANTEED UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The United States Court of Appeals for the Sixth Circuit, in its Order of December 14, 1977, states as follows:

> "The District Judge has made a certification of this Court concluding that no error prejudicial to the Appellants resulted from the final argument of the Prosecutor to the jury, or otherwise, during the period of the trial

> not reflected in the original transcript."

The United States Court of Appeals for the Sixth Circuit did not have the advantage of the record in that it was inadvertently destroyed by the court reporter. The Court of Appeals could not determine whether the remarks by the Prosecutor were prejudicial. The lower court held that it made no prejudicial error, and this is one of the basic issues appealed. It is the Petitioner's contention that there was prejudicial error made that could not have been cured. The Court of Appeals, by adopting the position taken by the District Court without the benefit of the record, has replaced their duty to review all the record with the conclusion of the District Court. In other words, the

Petitioner's right to an appeal was never granted in that the Court of Appeals simply adopted the opinion of the District Judge, the very opinion which was appealed.

There has been a showing, through Affidavit and argument by the Petitioner, that there was error made in that the destroyed portion of transcript affected Petitioner's substantial rights. The United States Court of Appeals for the Sixth Circuit did not have that specific portion of the record to determine whether or not there was error. It simply adopted the conclusion made by the District Judge as its own. The lower court's decision, however, is the primary reason for the appeal.

Furthermore, in the order of December 14, 1977, the Appellate Court

quoted as follows:

> "It being further concluded that there is sufficient evidence in the record to establish the essential elements of the crimes charged and to otherwise support the verdict of the jury."

The fact that there was sufficient evidence to meet the burden of a prima facie case on behalf of the Government is insufficient to affirm the verdict of the jury unless the Defendant's case is available to be reviewed by the Appellate Court.

It is the contention of the Petitioner that the statements made by the Prosecutor were prejudicial and those statements are forever lost. It is the duty of the Court of Appeals to determine whether said statements were in fact incurably prejudicial. The

District Court Judge determined that there was no prejudice, but the Petitioner disagrees and has exercised his right to an appeal to the United States Court of Appeals. Because said Court adopted the opinion of the District Court, without benefit of the transcript, he has been denied his rights guaranteed under the due process clause of the Fifth Amendment of the United States Constitution.

By accepting the conclusions of the District Court, the briefs and arguments submitted by Petitioner's counsel have fallen on deaf ears in that the Court of Appeals merely accepted, without reason and without consideration, that which was appealed. In effect, your Petitioner has been denied his

right to counsel as guaranteed by the Sixth Amendment to the United States Constitution in that all that was argued through briefs and orally was not accepted in that the Court of Appeals accepted a certification which was the very basis of the appeal.

II. WHEN A DEFENDANT IS DEPRIVED OF A FULL AND COMPLETE TRANSCRIPT OF CRIMINAL PROCEEDINGS DUE TO THE COURT REPORTER INADVERTENTLY DESTROYING A PORTION OF THE RECORD WHEN SAID DESTROYED PORTION CONTAINS FURTHER DIRECT TESTIMONY FROM THE DEFENDANT AS WELL AS CROSS EXAMINATION AND OTHER EXAMINATION OF THE DEFENDANT AS WELL AS THE CO-DEFENDANT AND CO-CONSPIRATOR'S CASE WHICH INDICATED THE STATE OF MIND OF THE COMPLAINANT AND CHIEF WITNESS FOR THE GOVERNMENT AS WELL AS THE PREJUDICIAL REMARKS MADE BY THE ASSISTANT U.S. ATTORNEY IN HIS CLOSING ARGUMENT, HARM THE DEFENDANT'S SUBSTANTIAL RIGHTS AND SHOWED THAT SAID CASE BE REVERSED, OR IN THE ALTERNATIVE A NEW TRIAL GRANTED.

Petitioner answers in the affirmative.

The U.S. District Court indicated that the answer would be in the negative.

The United States Court of Appeals for the Sixth Circuit did not have the available transcript to respond to said question, but adopted the opinion of the lower court.

Petitioner contends that there is no difference on appeal between in-

advertently destroying a tape of the proceedings and failing to record the proceedings under 28 U.S.C. 753 (b) of the "Court Reporters Act" which states "one of the reporters appointed for each court shall attend . . .and shall record verbatim . . . (1) all proceedings in criminal cases had in open court . . .". In each instance, the purpose of the statute is for the protection of parties and of court and to an end, whereby justice may be served by having an available, correct and authentic record preserved free from infirmities of human error so as to safeguard Defendant's rights. Where such a record in unavailable, Defendant's substantial rights are violated. Edwards v. U.S., 374 F.2d 24 (C.A. 10 Okla. 1966) and U.S. v Taylor, 303 F.2d 165 (C.A. 4 N.C. 1962).

In Stephens v U.S., (C.A. 5 Tex. 1961), the court held that failure of the court reporter to record arguments of counsel to the jury, was a reversible error in and of itself. The Fifth Circuit agreed with appellant's contention that he was entitled to a transcript of all the proceedings which took place in the court below in order that he may properly present specified errors on appeal. In Stephens, the court based its decision on the Court Reporters Act, 28 U.S.C. § 753 (b)(1970), which mandates the recording of all proceedings in open court in a criminal proceeding. The court concluded that "the result is that a full transcript is not available to us, /and/ we do not see how we can . . . adjudicate that there was no showing that any errors

which might have been reflected by the transcript were harmless", (at 309). Accordingly, the court granted a new trial.

Petitioner concedes that Stephens per se rule on reversal for a new trial where there is not a complete and accurate transcript has been modified by subsequent cases. The mere failure to record or have a record unavailable on appeal is not reversible per se without some showing by the appellant that the record which is unavailable contains error which affects Defendant's substantial rights.

Brown v U.S., 314 F.2d 293 (C.A. 9, 1963) and Calhoun v U.S., 384 F.2d 180 (C.A. 5 Miss. 1967), the court held that even though a record is incomplete, final arguments by U.S.

Attorney in his closing argument to the jury repeatedly, in quoting from Appellant Brown's Grand Jury testimony, interjected his own comments which were immediately objected to. Subsequent to the initial objection, the U.S. Attorney again interjected his own comments as if they were part of the record. Petitioner's position is that this interjection is a case of clear abuse by the U.S. Attorney and that it substantially prejudiced Petitioner's rights, Marks v U.S., 260 F.2d 377 (1958). In U.S. v Jones, 482 F.2d 747, (C.A. D.C. 1973), the court held that improper conduct which would amount to prejudice depends on the closeness of the case. In U.S. v Green, 497 F.2d 1068 (C.A. 7 1973), the court held that the statement must not be viewed by itself, but in the context

of the whole proceeding to determine if Defendant's rights were substantially harmed. Petitioner asserts that due to the Government's weak case against him and the Prosecutor's comments to the jury, these statements were prejudicial and cannot be viewed as a mere harmless error. The only evidence against Petitioner was a recorded telephone conversation not involving said Petitioner, testimony by Complainant Tucker and the Grand Jury proceedings. Standing alone, all evidence would only provide at the most, a circumstantially weak case for showing Petitioner's participation. Within that case, the Grant Jury testimony was the substantive evidence relied upon by the U.S. Attorney in substantiating his case. In Fowler v U.S., 310 F.2d 66

(C.A. 5 1962), the court held that "without a transcript of the argument of counsel we are unable to determine whether the U.S. Attorney made such prejudicial comment as to require reversal. This being so it follows that a new trial must be had." (at 312).

Rule 10 (c) and (e) of the Federal Rules of Appellate Procedure provides a manner in which an appellant can bring before the court matters which occurred during the proceeding and of which no record was made or is available. Appellant has tried to comply with this rule but concedes that he cannot agree with counsel or the U.S. Attorney to a supplemental record. The fact that such comments by the U.S. Attorney, during his closing argument, were interjected at will, makes such an attempt futile.

Even if such procedure was successful in supplementing the record, Petitioner has tried to comply with this rule but concedes that he cannot agree with the U.S. Attorney to a settled record. The fact that such comments by the U.S. Attorney, during his closing argument, were interjected at will makes such an attempt futile. Even if such procedure was successful in settling the record, Petitioner contends it would not be enough to avoid the court granting a new trial or reversal. In U.S. v Workcuff, 422 F.2d 700 (C.A. D.C. 1970) the court, faced with a record which omitted a jury instruction which counsel for appellant and U.S. Attorney later stipulated to based on the U.S. Attorney's note, stated:

"The difficulties inflicted upon

appellant's counsel by an inadequate transcript of the trial proceedings are necessarily shared by the reviewing court. It is difficult enough in normal circumstances to appraise the propriety of the trial court's various actions on the basis of a cold printed record; when that record is replaced by the incomplete hearsay recollections of one of the parties our review is turned into an exercise in creative imagination. 'It is a cardinal rule of appellate practice that the facts are those found in the record, not those found in the minds of the attorney' (citing U.S. v Sigal, 341 F.2d 837, 850 (C.A. 3, 1965) Cert denied 382 U.S. 811." (Emphasis added.)

The court based its holding on the view that absent a complete and accurate transcript the ability of appellate counsel to protect his client's basic rights would be impaired:

> "Recollections and notes of trial counsel and of others are apt to be faulty and incomplete. Frequently issues simply cannot ever been seen let alone assessed without reading an accurate transcript . . ." (at 202).

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In conclusion, it seems that even where an incomplete record was successfully supplemented by stipulation as in Workcuff, the appellate court will not allow such supplemental record to be a basis for appellate procedure.

Not only has your Appellant raised the issue of the prejudicial remarks made by the U.S. Attorney in closing argument, but upon thorough review of the record, he has become aware of the facts that part of his direct examination, as well as cross examination by the U.S. Attorney, and examination by co-defense counsel, as well as redirect examination, has been destroyed. Furthermore there were undoubtedly arguments made at the close of Appellant's case prior to the case of the Co-Defendant Mr. Welsh. During Mr.

Welsh's case, however, a police officer was placed on the stand who testified as to the mental attitude of the Complaintant and chief Government witness, Mr. Tucker. This testimony indicated that there was no fear in Mr. Tucker's mind which is a primary element of the crime of extortion.

III. WHETHER THE EVIDENCE SUBMITTED BY THE GOVERNMENT WAS INSUFFICIENT TO SUSTAIN A CONVICTION OF THE OFFENSE AS CHARGED IN THE INDICTMENT AGAINST MR. BROWN.

Petitioner answers in the affirmative.

The U.S. District Court answered in the negative.

The United States Court of Appeals for the Sixth Circuit indicated only that there was sufficient evidence to establish the crime.

At the close of the People's proofs and pursuant to Rule 29, Federal Rules of Criminal Procedure, the Petitioner Brown moved for motion for judgment of acquittal which was denied by the trial judge. Said basis for moving for a motion of acquittal is that the Government has failed to establish a prima facie case. Even though a very necessary part of this transcript has been destroyed, it is apparent from that

which remains that the Government has failed to submit evidence sufficient to sustain a conviction as a matter of law. The Petitioner Brown contends that the verdict is not supported by substantial and competent evidence. The evidence presented by the Government was in three forms: 1) Grand Jury testimony; 2) chief witness Tucker's testimony; and 3) recorded conversation between Co-Defendant Welsh and Tucker. At no time did the above evidence indicate or could it be inferred that Petitioner Brown knowingly induced the Co-Defendant Welsh to threaten Mr. Tucker. 18 U.S.C. 894 (1970) requires that the perpetrator of extortion knowingly participate in said extortion. The only evidence introduced by the Government is that Mr. Brown asked Mr. Welsh to assist him in the

collection of a debt. (Page 212, transcript). In fact, Mr. Tucker, the chief Government witness, testified that as soon as Mr. Brown was advised of the threat, there was no further contact with Mr. Welsh (Page 125, 126 and 127, transcript). This certainly does not indicate that Petitioner Brown knowingly participated in any threat against Mr. Tucker. Your Petitioner testified at the trial that as soon as he knew that Mr. Tucker had been threatened, he contacted Mr. Welsh and advised Mr. Welsh that there should be no further contact between him and Mr. Tucker. (Page 261, transcript).

The facts in evidence submitted by the Government merely show that Mr. Welsh threatened Mr. Tucker, but there was never any showing that

Petitioner Brown had any knowledge beforehand of said threat. Your Petitioner also testified that because of his position with his employer, he felt that it was impossible for him to pursue the normal legal channels to collect a debt. The record of the Grant Jury as well as the testimony of Mr. Brown indicates clearly that the Appellant Brown merely requested an old friend to assist him in collecting a debt, in that the Petitioner was unable to act based on a conflict of interest with his employer, Michigan Bell Telephone Company, (page 212 and 259, transcript).

To determine whether a judgment of acquittal is to be granted, it is necessary to test the sufficiency of the evidence in the light most favorable to the Government and to

determine whether there was substantial evidence from which the jury could have reached a verdict of guilty, U.S. v Ortiz, 445 F.2d 1100 (C.A. 10 1971) cert denied, 404 U.S. 993. It appears that the Federal Government's argument and evidence at trial presented an inference of wrongdoing based on the inference that Petitioner knew Welsh would threaten Tucker. Your Petitioner submits that such proofs do not as a matter of law present any substantial and competent evidence, and the Government has failed to meet its burden of showing that Petitioner knowingly participated in extortion, as defined in 18 U.S.C. 894 (1970).

Your Petitioner contends that no evidence was presented by the Government to establish a conspiracy.

Furthermore it is his contention that the evidence as submitted by the Government established as a matter of law that Petitioner Brown withdrew from the alleged conspiracy and the absence of his activity after he learned of Mr. Welsh's threat would preclude a conviction of that charge.

In U.S. v Carvelli, 340 F.Supp. 1295 (1972) affirmed 464 F.2d 1129, cert denied, 93 S.Ct. 462, 684; 409 U.S. 1023, 1076, the court stated absent affirmative evidence of withdrawal, once a conspiracy has been established it is presumed to continue. The essence of the offense of a conspiracy to extort is that the conspirators entered into a scheme or plan to extort and committed an overt act in furtherance of that scheme or plan. U.S. v

Rizzo, 373 F.Supp. 204 (D.C. N.Y. 1973). Petitioner contends that the Government has failed to show Petitioner's knowledge of such scheme or plan of extortion, i.e., threats by Co-Defendant Welsh to Mr. Tucker. Your Petitioner further contends that there was no intent on his behalf to further a scheme as created by Co-Defendant Welsh when he was informed of Mr. Welsh's threat to Mr. Tucker. After learning of these threats based upon a second meeting with Mr. Tucker, Mr. Brown immediately told Mr. Welsh that he would have no further involvement with such a scheme. In Hyde v U.S., 225 U.S. 347, 369 32 S.Ct. 793, 803, the court laid down rigorous requirements for creating the defense of withdrawal from a conspiracy; i.e., mere cessation of activity is not enough,

there must be some affirmative action either making a clean breast to the authorities or communication of abandonment in the manner reasonably calculated to reach co-conspirators. (Emphasis added). Such burden lies with the Defendant to establish withdrawal. U.S. v Borelli, 336 F.2d. 376 (C.A. 2 1964). Your Petitioner further contends that as a matter of law, he established that once he learned of Welsh's activities, he communicated with Welsh not to pursue the matter any further. This position is clearly stated in the surviving portion of the transcript from the fact that Tucker had no further contact with Mr. Welsh subsequent to his conversation with Petitioner Brown. It is your Petitioner's contention that this is within the withdrawal standards

as set forth in Borelli. Furthermore, the Petitioner voluntarily made a statement to the Federal Bureau of Investigation which established beyond a doubt that the statements made by the Petitioner on May 12, 1975, as a matter of law, showed his withdrawal from said conspiracy.

IV. WHETHER THE EVIDENCE INTRODUCED AT TRIAL REGARDING EXTORTION MET THE LEGISLATIVE INTENT WHICH IS THE BASIS FOR THE ENACTMENT OF 18 U.S.C. § 894.

Petitioner answers in the negative.

The U.S. District Court answered in the affirmative.

The United States Court of Appeals for the Sixth Circuit did not respond.

18 U.S.C. 891, et sequa, was created by the express intent of Congress to eliminate loan sharking, racketeering and organized crime. Furthermore the United States Congress went on to find that it is necessary to enact a law of this nature and that extortion directly affects the purpose of the laws of bankruptcy. Section 201 of Pub.L. 90-321. Section 1601 of Title 15, Commerce and Trade. The Government has failed to indicate any intent of loan sharking or racketeering

or organized crime. Further the laws of bankruptcy could not have been affected according to the testimony by the Government's chief witness in that said witness had the money available for repayment to Mr. Brown. Therefore, Mr. Tucker's company was not insolvent during the period of time that this alleged incident occurred. Furthermore in part of the transcript that was destroyed, Judge Cornelia Kennedy indicated that there was no evidence of organized crime in this matter which is one of the problems that the U.S. Congress attempted to eliminate as far as the collection of a debt.

It is implied in the legislative intent and from the reading of the applicable U.S. Code that extortion places the victim in fear for his own

safety or the safety of his property. The Government failed to establish any fear on behalf of Mr. Tucker. Unfortunately the transcript containing the testimony from a Sergeant Favors of the Livonia Police Department was destroyed. However, in his testimony, Sergeant Favors indicated that Mr. Tucker on the night of the alleged threat, in fact the night that the telephone conversation was recorded with Mr. Welsh, wasn't even concerned enough about his family to remain home. Furthermore, the following day Mr. Tucker advised the Livonia Police Department that he would not pursue the matter further. Petitioner Brown submits, as he did in argument to the court, that the extortion victim's state of mind was an essential element to be proved by the Government

and is one of the problems which the United States Congress intended to eliminate. Perez v U.S., 402 U.S. 146, 91 S.Ct. 1357 (1971).

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Honorable Court grant this Petition for a Writ of Certiorari to review the Order and judgment of the United States Court of Appeals for the Sixth Circuit.

HAMPTON, SNAVELY, RANNO
LIGHTBODY & GIRARD

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NOS. 76-1877, 76-1905

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA :

Plaintiff-Appellee :

v. :

LAWRENCE MALCOLM WELSH :

Defendant-Appellant : ORDER

:

UNITED STATES OF AMERICA

:

Plaintiff-Appellee

:

ROBERT E. BROWN

:

Defendant-Appellant

:

- - - - - - - -

Before: WEICK, PECK and MERRITT, Circuit Judges.

These appeals, perfected from judgments entered on jury verdicts finding defendants-appellants guilty of conspiring to and of using extortionate

means to collect money in violation of 18 U.S.C. § 894, have been submitted on the record on appeal and on the briefs and oral arguments of counsel. Pursuant to an order of remand, necessitated by a deficiency in the transcript of the trial court record, entered herein April 26, 1977, the district judge has made a certification to this court concluding that no error prejudicial to the appellants resulted from the final argument of the prosecutor to the jury, or otherwise, during the period of the trial not reflected in the original transcript. It being further concluded that there is sufficient evidence in the record to establish the essential elements of the crimes charged and to otherwise support the verdicts of the jury,

IT IS ORDERED that the judgments of the district court be and they hereby are affirmed.

ENTERED BY ORDER OF THE COURT

/s/
John P. Hehman, Clerk of the Court

(This order has been retyped to be attached as the Appendix to this Petition.)

FILED on December 14, 1977
John P. Hehman, Clerk

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, were forwarded to:

Solicitor General
of the United States
Department of Justice
Washington, D.C. 20530

by depositing same in the United States Government Mail, postage prepaid and clearly addressed on January 12, 1978.

HAMPTON, SNAVELY, RANNO,
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Supreme Court, U. S.
FILED
MAR 13 1978
MICHAEL RODAK, JR., CLERK

No. 77-1005

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT E. BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

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Washington, D.C. 20530.

In the Supreme Court of the United States

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ROBERT E. BROWN, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 42-44) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 1977. The petition for a writ of certiorari was filed on January 14, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the court of appeals erred in relying on the trial court's statement regarding what transpired during a portion of the trial proceedings that was not transcribed because of a wholly inadvertent erasure of the reporter's tape recording.

2. Whether the evidence was sufficient to sustain petitioner's conviction.

3. Whether loansharking or organized crime activities are essential elements of a violation of 18 U.S.C. 894.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to collect, and of aiding and abetting the collection of, an extension of credit by extortionate means, in violation of 18 U.S.C. 2 and 894. He was sentenced to concurrent terms of one year's imprisonment, of which all but 60 days were suspended in favor of probation.[1] The court of appeals affirmed (Pet. 42-44).

The evidence at trial showed that in December 1972 petitioner lent $3,000 to Cecil Tucker. Tucker testified that the loan was to be interest-free, that there was no time limit for repayment, and that in the next two years he repaid part of the amount (Tr. 54-57, 129).

In the fall of 1974, petitioner called Tucker and requested repayment in full; however, Tucker was unable to repay the entire amount (Tr. 57). Because he felt he could not collect the loan through legal channels and because he was fearful that his employer would regard the relationship with Tucker as a conflict of interest,[2] petitioner asked Welsh, whom he knew to be a "very rough talking man," for assistance, telling him that

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[1]Petitioner's co-defendant, Lawrence Malcolm Welsh, was convicted and sentenced to concurrent terms of 18 months' imprisonment and a fine of $5,000.

[2]Petitioner was a foreman with Michigan Bell, which awarded contracts to Tucker's company.

Tucker owed him $15,000 and offering Welsh 25 percent of whatever he collected (Tr. 190, 211-213). Thereafter, Welsh called Tucker and threatened to do injury to him and his family if Tucker did not pay $16,000; he gave Tucker three hours to consider this ultimatum (Tr. 62-63). After reporting the threat to local police (Tr. 64), Tucker telephoned Welsh. In that telephone call, which was recorded by the police with Tucker's consent, Welsh threatened to "[p]ut you in one of my fuckin rubbish trucks and grind you up" (Gov't Exh. 1, 1a). Tucker met with petitioner the next morning. Petitioner asked Tucker if Welsh had gotten in touch with him. Tucker said yes and offered to repay the $3,000; petitioner said he was not interested (Tr. 117, 122). No further threats were made by petitioner or Welsh.

A portion of the trial was not transcribed due to an inadvertent erasure of the court reporter's stenomask tape. The untranscribed portions of the trial included five minutes of petitioner's direct testimony, his cross-examination and redirect examination, the testimony of a witness called by co-defendant Welsh, closing arguments, and the court's charge to the jury. When the mistake became known, the parties resorted to Rule 10(c), Fed. R. App. P., which provides for a settled statement of evidence or proceedings.[3] Petitioner submitted a statement of the proceedings, with affidavits from persons

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[3]Rule 10(c) provides:

(c) **Statement of the Evidence or Proceedings When no Report Was Made or When the Transcript is Unavailable.** If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose amendments thereto within 10 days after

present in the court at the time; the government submitted its objections to petitioner's version; and the district court prepared its "Statement Under Rule 10(c), Rules of Appellate Procedure, as Settled By The Court" (hereafter "Statement").

ARGUMENT

Petitioner contends (Pet. 11-27) that the prosecutor made remarks in closing argument which prejudiced him and that evidence which would have created a reasonable doubt as to his guilt was not transcribed. These claims are without merit.

1. The claim that the prosecutor made improper remarks during closing argument refers to comments of the prosecutor as he was reading excerpts of petitioner's grand jury testimony. As the district court noted in its Statement, petitioner objected to the fact that the prosecutor was interspersing argument with recital of the statement. The court overruled the objection but directed the prosecutor to make "very clear" where reading and argument began and ended; the court stated that the prosecutor complied (Statement 8). In denying petitioner's post-trial motion for a new trial, which was partially based on this allegation of error, the court stated that the jury was sufficiently informed by both the attorneys and the court itself that statements by counsel were not evidence (Tr. II, 4; see also Tr. 28).[4]

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service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

[4]"Tr. II" refers to the sentencing transcript.

The court also found no error in the prosecutor's characterization of Welsh's threats—to put Tucker in a garbage truck and "grind him up"—as a threat to "kill" Tucker (Statement 8). Because the prosecutor was entitled to comment on evidence admitted at trial and to draw reasonable inferences, including the inference that a threat to grind someone up is a murder threat (see *United States* v. *Serlin*, 538 F. 2d 737 (C.A. 7); *United States* v. *Lindsay*, 552 F. 2d 263 (C.A. 8)), there was no error in the prosecutor's closing argument.

2. The fact that a verbatim record of petitioner's own testimony was not before the court of appeals was not grounds for reversal. The district court's Statement addressed the parties' summary of that testimony (Statement 4-6). In any event, a reviewing court need not weigh conflicting evidence, but must determine only whether there was sufficient evidence presented by the government to support the jury's verdict. *Glasser* v. *United States*, 315 U.S. 60, 80; *United States* v. *Walton*, 552 F. 2d 1354 (C.A. 10); *Massey* v. *United States*, 407 F. 2d 1126 (C.A. 9); *United States* v. *Valle-Valdez*, 554 F. 2d 911 (C.A. 9). After finding that the government presented enough evidence to sustain petitioner's conviction, the court of appeals was not required to consider petitioner's conflicting testimony in order to make an independent adjudication of guilt.

3. Petitioner further asserts that the court of appeals improperly relied on the district court's version of what took place, and that the gap in the transcript violated his statutory right to a verbatim record. The trial court, however, fully complied with Rule 10(c), Fed. R. App. P., which provides the mechanism for settling the record where the transcript is unavailable. Absent a showing of intentional falsification or evident unreasonableness, that

determination is conclusive and may properly be accepted by the court of appeals. Cf. *United States* v. *Mori*, 444 F. 2d 240, 246 (C.A. 5), certiorari denied, 404 U.S. 913; *Buick* v. *United States*, 396 F. 2d 912, 913-914 n. 1 (C.A. 9).[5]

4. Petitioner also contends (Pet. 28-36) that the evidence was insufficient to sustain his conviction. This contention is insubstantial.

The uncontradicted evidence demonstrated that petitioner, seeking to collect a $3,000 debt from Tucker and feeling that he could not use available legal channels, employed co-defendant Welsh because he knew that Welsh was a "very rough talking man," that he told Welsh that Tucker's debt was $15,000, and that he offered Welsh 25 percent of whatever Welsh collected. There was also substantial evidence that Welsh sought to frighten Tucker into making the payment through the use of threatening telephone calls. The logical and permissible inference is that petitioner was aware of and at least implicitly consented to the threats that Welsh employed; this is sufficient, even without proof that petitioner knew all the details of Welsh's conduct, to sustain his conviction for aiding and abetting the commission of the offense. See *Williams* v. *United States*, 308 F. 2d 664 (C.A. 9); *United States* v. *Greer*, 467 F. 2d 1064 (C.A. 7), certiorari denied, 410 U.S. 929.

Petitioner additionally suggests that the government failed to establish that Tucker was put in fear for his own safety. To sustain a conviction under 18 U.S.C. 894,

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[5] *Calhoun* v. *United States*, 384 F. 2d 180 (C.A. 5), *Brown* v. *United States*, 314 F. 2d 293 (C.A. 9), and *Fowler* v. *United States*, 310 F. 2d 66 (C.A. 5), as well as other cases relied upon by petitioner, are inapplicable, since they involve deliberate failure to record testimony in violation of 28 U.S.C. 753(b), which the instant case does not.

however, "[a]ctual fear need not be generated, so long as the defendants intended to take actions which reasonably would induce fear in an ordinary person * * *. [I]t is the conduct of the defendant, not the victim's individual state of mind, to which the thrust of the statute is directed. We have no doubt that Congress meant to protect not only the weak and timid from extortionate threats, but the strong and intrepid as well." *United States* v. *Natale*, 526 F. 2d 1160, 1168 (C.A. 2), certiorari denied, 425 U.S. 950. See also *United States* v. *Alsop*, 479 F. 2d 65, 67 (C.A. 9).

5. Petitioner's final contention (Pet. 37-40) that 18 U.S.C. 894 is intended to apply only to loansharking or racketeering activity, is unsupported by the language of the statute. See *Barrett* v. *United States*, 423 U.S. 212, 217. Moreover, the courts of appeals that have considered the issue agree that although Congress meant Section 894 to be employed against organized crime and loansharking enterprises, it did not intend to limit the scope of the statute's application to those activities. "It is sufficient that Congress has defined a limited class of credit transactions, *i.e.*, those involving extortionate means of extension and collection, as having a substantial effect on interstate commerce. That this particular transaction cannot be directly tied to organized crime, does not affect the validity of the congressional approach employed here." *United States* v. *Keresty*, 465 F. 2d 36, 42-43 (C.A. 3), certiorari denied, 409 U.S. 991. See also *United States* v. *Schwartz*, 548 F. 2d 427, 428 (C.A. 2); *United States* v. *Schaffer*, 539 F. 2d 653, 654-655 (C.A. 8); *United States* v. *Andrino*, 501 F. 2d 1373, 1376-1378 (C.A. 9); *United States* v. *Annerino*, 495 F. 2d 1159, 1164-1165 (C.A. 7); *United States* v. *Briola*, 465 F. 2d 1018, 1021 (C.A. 10), certiorari denied, 409 U.S. 1108. Since Congress intended to regulate extortionate credit transactions as a "class of activities," there is no reason to limit the scope of the

statute to activities involving organized crime or loansharking, particularly since the language of the statute provides no such limit. Cf. *Perez* v. *United States*, 402 U.S. 146, 154.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1978.

DOJ-1978-03